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*in opinion*

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October 9, 1956

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CONCORD, N.H.

Mr. Kenneth L. Cowan, Director  
Inheritance Tax Division  
Tax Commission  
State House  
Concord, New Hampshire

Re: Estate of Charles  
L. Tinker, #72313

Dear Mr. Cowan:

In a letter of September 20, 1956 you discussed the case of a decedent who died domiciled in New Hampshire and who in his will bequeathed to his brother "the principal and income in the trust fund created for me by Sarah J. Robinson."

You inquire whether such bequest constitutes a transfer taxable under RSA 86, Taxation of Legacies and Successions. We reply in the negative.

It appears that Robinson, who predeceased the decedent, died a domiciliary of New York. During her lifetime she had created a trust which provided inter alia that the income of the trust should be paid to the present decedent for his life, and that upon his death the principal should pass

"... as the said [present decedent], may direct by validly executed last will and testament. The intention of the party of the first part is that the principal of the trust fund shall be disposed of by the last will and testament of the [present decedent]..."

The trust res was located in New York under the management of a corporate trustee in that state.

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The right or interest of the present decedent with respect to the trust res constituted a power of appointment. See e.g., 41 Am. Jur. "Powers" s. 2. It is a rule of the common law that upon the exercise of a power of appointment the property subject to it passes from the estate of the donor of the power to the appointee, without the intervention of the laws of the state of the donee's domicile and without becoming part of his estate. Kidder, State Inh. Taxes, 41-42; see also 26 Iowa L. Rev. 549 et seq. No statute modifying the common law rule in this regard in this state being discovered, the common law rule applies here.

In such state of the law, the passage of the principal of the trust res to the brother of the present decedent does not give rise to a tax in this state.

Very truly yours,

Warren E. Waters  
Deputy Attorney General

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